

the anterior apprising, being without infestment or charge as to the years after the rebellion, and preferred the appriser as to years preceding. No 14.

*Fol. Dic. v. 1. p. 179. Stair, v. 1. p. 727.*

1705. June 26. STEWART of Pardovan *against* STEWART of Torrence.

IN the competition of the creditors of George Dundas, Pardovan produces an adjudication of a bond granted by Bonhard to George Dundas, his heirs and executors, containing a precept of sasine, and craves to be preferred to Torrence, who produced an arrestment in Bonhard's hands, and a decret of furthcoming, upon this ground, because his citation in the adjudication was before the arrestment, and his decret before the furthcoming.

It was *alleged* for Torrence ; That the sum was moveable, and an adjudication was no competent nor habile diligence, because no infestment had followed upon the bond, neither was the first term's payment of annualrent, nor the term of payment of the principal sum past, when Pardovan raised and executed his adjudication ; and sums heritable by destination were always reckoned moveable till the first term's payment of the annualrent.

It was *answered* ; *1mo*, The question is not here betwixt an heir and an executor, but betwixt competing creditors. *2do*, This bond, containing a precept of sasine, and bearing annualrent from a term preceding the citation, was heritable from the beginning ; and the 32d act, Parliament 1661, declares such bonds to be heritable.

It was *replied* ; The case is to be considered in the same way as if the question were betwixt the heir and the executor. Sums moveable fall to the executor, and cannot be adjudged, because they are moveable. *2do*, As to the act of Parliament 1661, it does declare such bonds to be heritable ; but that is only to distinguish them from bonds bearing annualrent, which by that act are declared moveable, even after the term of payment, which antiently were heritable, yet were esteemed moveable before the term of payment : as to which, there is nothing enacted by that law, and therefore it has been frequently decided, that bonds heritable after the term of payment, are moveable before ; as *penult.* of June 1624, Smith *contra* Anderson's relict, *voce* HERITABLE and MOVEABLE.

It was *duplicated* ; Decisions in this case favour Pardovan, as well as the positive statute, as Bairns of Colonel Henderson *against* Murray, *voce* HERITABLE and MOVEABLE ; where the Colonel having taken a bond bearing annualrent from Whitsunday, payable at Martinmas, and he dying in August, the bond was found heritable ; the like the last of July 1666, Gray *contra* Gordon, *IBIDEM*, *et voce* ESCHEAT, where a bond bearing the term of payment to be diverse years after granting the same, and annualrent to be paid yearly and termly in the interim, was found to be heritable, though the creditor deceased before the term of payment ; Anderson *contra* Anderson, *voce* HERITABLE and MOVEABLE. And,

No 15.

In a competition betwixt an adjudger and arrester, the subject being an heritable bond, the citation on the adjudication being prior to the arrestment, and the decree of adjudication also prior to that of the furthcoming, the adjudger was preferred.

No 15.

as to the practise cited by Torrence, the case differs from the other practises in matter of fact, which is the foundation of the difference of the decision; for there the bond bore only annualrent from the term of payment, and so, at the creditor's death, which was before the term, it bore no annualrent; whereas in this case, and the other practises cited, though the defunct died before the term, yet the annualrent was current from the date of the bonds, which, by the conception thereof, and the design of the creditor, were heritable.

'THE LORDS found the sum heritable and adjudgeable.'

It was further *alleged* for Torrence; He was still preferable, because such bonds, though heritable, are also arrestable by the 51st act, Parl. 1661; and his arrestment being before Pardovan's adjudication, he was preferable.

It was *answered*; That the citation in Pardovan's adjudication is prior to the arrestment, and his adjudication before the furthcoming; so that his diligence did first commence, and was first complete.

It was *replied*; A citation in an adjudication is a good prohibitory diligence to disable the debtor from voluntary deeds, but does no ways affect the subject; whereas an arrestment is *nexus realis*, which really affects the subject arrested, and transfers the property. Though a furthcoming be necessary to compleat the right, yet the summons of furthcoming libels the arrestment to affect the subject, and transmit the right, and therefore concludes that the same should be made furthcoming. It is true the right acquired by the diligence of arrestment is easily lost, if the same diligence be not duly prosecute, so as other creditors intervene; but here there is no negligence; for albeit the competing adjudication be prior, that is because adjudications abide not the course of the roll, not require probation; but otherwise all possible diligence was adhibit in obtaining this furthcoming.

It was *duplied*; That the property is not conveyed by an arrestment without a furthcoming; neither will an arrestment hinder poiding; and in this case Pardovan having used a habile diligence, and cited before the arrestment, and also obtained the first decret, he is undoubtedly preferable.

'THE LORDS preferred the adjudger.'

It was further *alleged* for Torrence; Still he is preferable, because, for his further security, he also obtained the first adjudication; and that though Pardovan adjudged within year and day, because the subject adjudged was a liquid sum of money, which is naturally divisible, and can be proportioned to the debt adjudged for; and the act 1661 bringing in adjudications *pari passu*, doth only concern apprisings or adjudications of real rights whereupon infestment followed, as appears by the act itself bearing, That all adjudications within year and day of the first effectual comprising are *pari passu*; and for explaining what is meant by an effectual comprising, it is declared, That such comprising as are preferable to all others, in respect of the first real right and infestment thereon, or the first exact diligence for obtaining the same, are and shall be holden the first effectual comprising. And seeing in this case there neither

was nor could be any infestment for denuding the creditor, who stood not infest, the act takes no place, but the adjudications are preferable according to their dates.

No 15.

It was *answered* ; The reason expressed in the act is general, relating to all creditors doing diligence, and considers the prejudice of creditors who are at a great distance, whereby the debtor's estate is comprised, which word *estate* comprehends all comprisable subjects ; and then considers the prejudice of creditors, who have nothing but legal reversion ; and for remeid thereof, statutes that all comprisings within year and day of the first effectual comprising shall come in *pari passu* ; and what follows for clearing an effectual comprising, is indeed to be understood only of comprising of lands or real rights, because in that case an apprising, without an infestment or charge, is but personal, and a posterior apprising with an infestment is preferable ; but an apprising of a personal right is complete and effectual from the date.

' THE LORDS found that the adjudgers ought to come in *pari passu*.' See No 14. p. 140., and No 41. p. 703.

*Fol. Dic. v. 1. p. 179. Dalrymple, No 63. p. 79.*

1724. January 8.

SYME *against* DALZELL.

IN a competition betwixt two creditors of a defunct, about the rents of the estate falling due after the debtor's death ; both having obtained decrees of constitution against the apparent heir ; the one upon an arrestment laid on in the tenant's hands as debtors to the apparent heir, obtained furthcoming ; the other upon a charge to enter heir, obtained adjudication some months thereafter. THE LORDS preferred the arrester, though it was urged, that an apparent heir has no proper title to the rents, and that they cannot be made furthcoming for his debt. See APPARENT HEIR.

No 16.

*Fol. Dic. v. 1. p. 179.*

1758. July 18.

GILBERT JACKSON, and Others *against* JAMES HALIDAY, and Others.

ON the 5th November 1750, William Ferguson disposed his lands of Cairloch to Duke and Brown ; and they became bound to redeem these lands from Mr Heron, to whom they had been disposed under reversion, and to grant back-bond to Ferguson, declaring the lands redeemable between and Martinmas 1751, upon payment of debts due to them, and of the redemption-money they were to pay to Heron ; under condition, ' That if Ferguson should not redeem at Martinmas 1751, they should be at liberty to sell the lands by public roup, and

No 17.

A creditor held lands, with a power to sell (if not redeemed within a limited time), and to account for the price ; ano-